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No. 95-209

IN THE

Supreme Court of the United States

October Term, 1995

JEFFERSON-PILOT INSURANCE COMPANY, INC.,
Petitioner,

v.

WILLARD WEEMS and JULIA WEEMS,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this case is ripe for review.

2. Whether the State Court has subject matter jurisdiction of this action for breach of fiduciary duty and interference with ERISA protected rights under 29 U.S.C. 1132(A)(1)(b).

3. Whether ERISA authorizes the recovery of extra contractual damages under 29 U.S.C. 1132(A)(1)(b).

4. Whether the Plaintiffs are entitled to a trial by jury in State Court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW, JURISDICTION AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's statement of the opinion below, statement of jurisdiction and the statutory provisions involved.

STATEMENT OF THE CASE

This is an action under ERISA for an alleged breach of fiduciary duty, for interfering with a participant's ERISA rights, and for such other legal and equitable relief to which the plaintiff is entitled under ERISA, 29 U.S.C. 1132(A)(1)(b).

FACTS

In 1988, A.C. Johnson Trucking Company employed respondent, Willard Weems, as its "marketing manager". In that same year, Johnson Trucking Company began providing major medical, life and disability insurance for its employees through a policy underwritten and insured by Jefferson Pilot, Petitioner. This arrangement allowed Johnson Trucking Company employees to purchase coverage for their dependents through monthly payroll deductions.

Johnson Trucking Company failed to pay Jefferson Pilot the premiums due on several occasions, resulting in a lapse of plan coverage. Eventually, however, Johnson Trucking would "catch the payments up" and Jefferson Pilot would not only honor claims during the period of lapse, but would reinstate the coverage. No notice was ever given to any participant or beneficiary under the plan of the lapse in plan coverage.

In early 1990, Johnson Trucking Company once again became delinquent in its premium payments, although employee wages continued to be deducted. On April 23, 1990, Jefferson Pilot notified Johnson Trucking Company that it had not received the March premium, and further stated, that Johnson Trucking Company would "receive a confirmation of termination", absent receipt of the delinquent premiums within fifteen (15) days. Johnson Trucking Company never paid the premium; nevertheless, on May 5, 1990, Jefferson Pilot's "underwriting department" authorized a six (6) month plan renewal, even though the last premium payment had not been made since March, 1990. Before July 27, 1990, Jefferson Pilot contacted Johnson Trucking Company on at least one (1) more occasion regarding the delinquent premiums. On that date, however, having received no payment, Jefferson Pilot sent Johnson Trucking Company a letter stating that the insurance plan had been canceled retroactively to April 30, 1990. On

August 1, 1990, Johnson Trucking Company, for the first time, notified its employees of the lapse in plan coverage.

During the interim, on June 5, 1990, the Respondent, Willard Weems, suffered a heart attack and required emergency hospitalization. Jefferson Pilot, through its insurance plan notification procedures, was apprised of Weems' condition, and on three (3) separate occasions "certified" or approved his hospitalization through June 28, 1990. Weems initially incurred over Eighteen Thousand and No/100 Dollars ($18,000.00) in medical expenses. Before July 27, 1990, Jefferson Pilot paid in excess of Six Thousand and No/100 Dollars ($6,000.00) of Weems' expenses. After that date, however, Jefferson Pilot ceased paying the claim and in addition, successfully sought reimbursement for the amount it had previously paid from Weems' medical providers.

Moreover, Jefferson Pilot also received notification from other plan participants during the period of non-payment of plan premiums [April-June, 1990] regarding such inquiries as the proper place to send COBRA payments, yet at no time, did Jefferson Pilot inform any of the participants of the lapse or impending lapse in plan coverage. Jefferson Pilot, by its silence and misstatements to the Weems that their hospital stay was "approved" and directing other beneficiaries that COBRA payments be made to the employer, breached its fiduciary obligations to inform the participants, in a timely manner, of the lapse in plan coverage. Jefferson Pilot's contention to this Court that all of its actions were "well within its rights under the policy" is clearly inaccurate.

PROCEEDINGS BELOW

On January 4, 1991, the Weems filed suit in State Court against Johnson Trucking Company, alleging various claims under state law including fraud. Jefferson Pilot was added as a party defendant by amended complaint on April 16, 1991.

Jefferson Pilot sought removal of the action to the United States District Court for the Northern District of Alabama on grounds that the plaintiffs' claims were preempted under ERISA. The District Court remanded the action back to the Alabama State Court, having concluded the action was removed "untimely". Plaintiffs' amended complaint stated various causes of actions comprising them both under state law and ERISA. The State law claims were based upon the Alabama decision of *Newton v. United Chambers Insured Plans*, 45 So.2d 1147 (Ala. 1986) which requires timely notification to the participant of the termination of plan coverage by the insurance company. ERISA claims were asserted under 29 U.S.C. 1109; 29 U.S.C. 1132(A)(3); 29 U.S.C. 1132(A)(1)(b); 29 U.S.C. 1105(A)(1); 29 U.S.C. 1132(A)(3); and 29 U.S.C. 1104(A) and (B).

After discovery was completed, both parties moved for partial sumary judgment. The plaintiff moved for partial summary judgment on the liability of the defendants (Johnson Trucking Company and Jefferson Pilot) and the Defendant, Jefferson Pilot, sought to strike the plaintiffs' state law claims as being preempted by ERISA and moved to strike both the extra contractual request for relief and the jury demand. (R.29, 59-60, 76, 96.) The Trial Court denied the plaintiffs' motion for summary judgment and held that the state law claims were preempted by ERISA and that the rule announced in *Newton* was not otherwise saved as a law "regulating insurance" within the savings clause of 29 U.S.C. 1144(B)(2)(a). Plaintiffs appealed (R.105).

On May 5, 1995, the Alabama Supreme Court reversed the Trial Court's determination that the plaintiffs' ERISA claims are "defective for the reason on which the trial court's summary judgment expressly rests, namely, that ERISA does not authorize recovery of punitive damages or extra contractual damages. The judgment of the Trial Court, to the extent that it held so, is reversed." In addition, the Alabama Court held

that "to the extent it concluded that a plaintiff is never entitled to a jury trial on claims brought pursuant to 1132(A)(1)(b) [it] erred.

Jefferson Pilot then filed an application for rehearing, arguing *now* for the first time after it had lost part of the appeal, that the State Court lacks subject matter jurisdiction over the remaining ERISA claims for breach of fiduciary duty and interference with obtaining plan benefits. Jefferson Pilot did not argue in its application for rehearing that the Alabama Supreme Court should reconsider its ruling as to its awards of extra contractual damages are not possible nor that the plaintiff does not have a right to trial by jury.

On June 16, 1995, the Alabama Supreme Court overruled Jefferson Pilot's application for rehearing (without an opinion). On August 9, 1995, Jefferson Pilot filed its application for certiorari to this Court.

REASONS FOR DENIAL OF THIS WRIT OF CERTIORARI

The Court should not grant the Writ of Certiorari in this case given that:

1. There has been no award of extra contractual damages; the Respondents have not prevailed on any claim; neither the Trial Court nor the Alabama Supreme Court ruled upon the merits of the Respondents' claim; and there has been no underlying trial in this cause.

2. The Alabama Supreme Court's interpretation of *Ingersoll Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478 (1990), is not clearly erroneous, so as to subvert any intention of this Court nor of Congress.

3. This case can be held or remanded in light of one (1) of

the issues to be decided in *Varity Corp. v. Howell*, #94-1471 (U.S. *Cert. granted* April 24, 1995) since *Varity* may have an impact on one of the underlying issues in the case *sub justi*, namely whether ERISA permits individual plan participants to sue on their own behalf for alleged breaches of fiduciary duty.

ARGUMENTS

1. This case, in its current posture, is not ripe for review. There has been no judgment or order awarding extra contractual damages, either compensatory or punitive. There has been no judgment on the merits of the plaintiffs' claims in the lower courts. The only issue that appears to be ripe for review is the jury trial issue. Better posture in this case would be to resolve all issues after a determination has been made on the merits of the action, rather than proceeding in a "piecemeal" fashion. *See, Pacific Gas and Electric Co. v. State Energy Resources Cons. and Dev. Comm.*, 461 U.S. 190, 103 S.Ct. 1713 (1983). In addition, the other defendant, Johnson Trucking, may have the same or similar appeal grounds as Jefferson Pilot after a verdict.

The better procedure would be to deny certiorari and allow the Alabama Supreme Court to review this case in light of this Court's holding in *Varity Corp. v. Howell*, Case No.: 94-1471 (U.S. *Cert. granted*, April 24, 1995), since it may affect one of the issues that has never been raised prior to this brief, namely whether ERISA permits an individual participant to sue for a breach of fiduciary duty.

Furthermore, the hardship on both of the parties is minimized by waiting to review this case until a trial on the merits has been completed rather than proceeding through an interrogatory appeal. The pleadings and causes of action are less than clear and there has been no ruling on the merits of the

plaintiff's claims by the lower courts. The defendants may prevail on the merits, making an appeal unnecessary. The wisest course of action for this Court would be to either deny certiorari or hold this action and remand in light of *Varity*.

2. The Alabama Supreme Court, as a state court, does have concurrent subject matter jurisdiction of ERISA claims. 29 U.S.C. 1132(A)(1)(b). If an action includes claims that arise both under state and federal law, then the state court can, like a federal court, retain jurisdiction of the federal claims under either an ancillary or pendent jurisdiction. *Infra, Ex Parte Gurganus*, 603 So.2d 903, 908 (Ala. 1993) [Justice Shores concurring in result]. State courts have jurisdiction to entertain legal actions under 1132(A)(1)(b) if a participant pleads, and can prove that he is entitled to damages under a cognizable legal claim. *Ex Parte Gurganus*, 603 So.2d at 908 (Justice Shores concurring in result). Moreover, we note that the "interference claim" is a cause of action that arises under 29 U.S.C. 1140, which is the same type of claim that this Court reversed back to a Texas state court in *Ingersoll Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478 (1990). The remand order did not order the state court to dismiss the case for lack of subject matter jurisdiction.

It is also worthy to note that the defendants have actively litigated in state court under these various ERISA claims for over three and one-half (3½) years and not once, have they raised the issue of the "lack of subject matter jursidiction" until they received a partially adverse ruling. That ruling also was, in part, favorable to the petitioners. The petitioners wish to accept subject matter jurisdiction from the State Court on the rulings where it prevails but does not wish to accept jurisdiction on the issues it lost. In a sense, Jefferson Pilot wants to "have its cake and eat it too".

3. Awarding compensatory and punitive damages, when the facts support such an award, does not violate a Congressional intent when ERISA was established. In a case where a defendant has knowingly and intentionally breached its obligation to inform plan beneficiaries of the cancellation of plan coverage in a timely manner and in particular where this Petitioner had direct contact with the Respondent on at least three (3) occasions, agreed to pay and actually paid, one-third (1/3) of his benefits and then unilaterally decides to back date the termination of coverage to prevent further payment is a breach of fiduciary obligation at its worst, demanding punishment and deterrence so that fiduciary obligations will be adhered to. Congress, when enacting ERISA, would never have passed such a "sweeping" form of legislation under the "guise" of protecting plan beneficiaries and removed all incentives for insurance companies to adhere rigidly to fiduciary standards. Punitive and extra contractual damages are appropriate in some instances under ERISA. *See, e.g. East v. Long*, 785 F.Supp. 941 (N.D. Ala. 1992); *International Union United Automobile Aerospace and Agricultural Implement Workers v. Midland Steel Prod. Co.*, 771 F.Supp. 860 (N.D., Ala. 1991).

The ability of the courts to entertain and develop a body of federal common law as to damages under ERISA was reinforced in 1988 when the Education and Labor Committee of the House of Representatives' report to Congress emphasized that

> Congress intended for courts to develop a federal common law with respect to employee benefit plans including the development of appropriate remedies, even if they are not specifically enumerated in section 502[U.S.C. 1132] of ERISA.

The House Committee went on to note:

> In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonable, delayed or totally disregarded by an insurer, an employer, a plan of ERISA administrator, or a plan committee intends Federal Courts to develop a federal common of remedies, including (but certainly not limited to) the one imposition of punitive damages on the person responsible for the failure to pay claims in a timely manner. H.R. Rep. No. 801, 100th Congress, 2d Sess. p.2, at 63 (1988).

4. The Plaintiff is entitled to a jury trial on the remainig ERISA issues pursuant to 29 U.S.C. 1132(A)(1)(b). The Alabama Supreme Court held that the remaining claims, primarily, were legal in nature and that relief under ERISA 502(A)(1)(b); 29 U.S.C. 1132(A)(1)(b) permits either the plaintiff or defendant to request a jury trial when the issue is at controversy. The Alabama Supreme Court held that because of the recovery of compensatory and punitive damages was possible that this "leads inexorably to the right to trial by jury" as guaranteed by the United States Constitution, amend. VII. *Weems v. Jefferson Pilot Life Insurance Co.*, ____ So.2d ____ (Ala. 1995).

Moreover, since this action is pending in State Court and not federal, there is nothing in the federal statute that would prohibit the State Court from granting a jury trial if the state constitution or state statute provides for the action to be tried by a jury. Article I, sec. 11 of the Alabama Constitution provides "[T]hat the right of trial by jury shall remain inviolate". Alabama's courts have construed this provision to mean that in those actions which are legal in nature as opposed to equitable, either party has a right to have its case heard and tried by a jury. *See, Finance, Inv. & Rediscount Co. v. Wells,*

409 So.2d 1341 (Ala. 1981). The Alabama Supreme Court considers that claims tried under 29 U.SC. 1132(A)(1)(b) on account of a breach under the terms of the plan to be primarily a "legal" action, entitling the plaintiff or defendant to a jury trial, if so demanded.[1] *Weems v. Jefferson Pilot*, ____ So.2d. ____ (Ala. 1995); *Ex Parte Gurganus*, 603 So.2d at 908 (Justice Shores concurring in result).

In addition, an advisory jury is always possible if the right is not guaranteed by statute or the constitution under both the Federal and Alabama Rules of Civil Procedure. See Rule 39(c) of the F.R.C.P. and A.R.C.P.

CONCLUSION

In conclusion, this case, in its current posture, is not ripe for review. Many of the issues that have been appealed have not been finally decided upon by the state court and are too speculative at this juncture. The better posture would be to either deny certiorari and/or remand this action, in light of this Court's decision in *Varity Corp. v. Howell.*

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[1]The Petitioner was correct in pointing out that when the case is tried in federal court, federal courts are divided as to whether a jury trial is possible under 502(A)(1)(b); 29 U.S.C. 1132(A)(1)(b) for an action to enforce rights under the terms of a plan or to recover benefits due under the terms of the plan. *See, e.g., Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir.); *Blake v. Unimutal Stock Life Insurance Co.*, 906 F.2d 1525 (11th Cir. 1990). For the opposing view, *see, e.g., Sullivan v. L.T.V. Aerospace and Defense Co.*, 850 F.Supp. 202 (W.D.N.Y. 1994); *McDonald v. Artcraft Electric Supply Co.*, 744 F.Supp. 29 (D.D.C. 1991).

For the reasons stated herein, certiorari should be denied or held and disposed of, in light of this Court's decision in *Varity Corp.*

Respectfully submitted,

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October 6, 1995